A. Video

In many rural areas of the country and much of rural Alaska, there are no cable television systems or other forms of multichannel video programming distribution ("MVPD") services other than DBS. Thus, in these areas, this proposed transaction would eliminate all meaningful competition in MVPD services. In most other areas of the country, there is only one other provider of MVPD services – the local cable television system.[7] In these areas, this transaction would reduce competition from three distributors of multichannel programming to two distributors of multichannel programming.

The State understands that public representatives of rural communities in southern and western states are concerned about this transaction because its residents do not receive good quality DBS signals now. Many in rural communities are concerned that competition – and, as a result, service quality – will decline if this application is granted.[8]

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7 MVPD services include cable, DBS, multichannel multipoint distribution, and satellite master antenna television. *See* 47 U.S.C. § 522(13). The Commission has defined MVPD services as a relevant market in its review of several transactions, including AOL-Time Warner, AT&T-MediaOne, and AT&T-TCI. *See AOL-Time Warner Order*, 16 FCC Rcd. at 6647, ¶ 244; *AT&T-MediaOne Order*, 15 FCC Rcd. at 9834, ¶ 36; *AT&T-TCI Order*, 14 FCC Rcd. at 3172-73, ¶ 21.

8 The Commission has received letters from the House Rural Caucus (with 88 signatures), the Western Caucus (with 13 signatures), Senators Stevens and Hollings, and Senator Snowe attesting to concerns of the impact of the transaction on rural consumers.

Alaskans have special concerns in that regard. The Commission is aware of Alaska's concerns about signal quality,[9] but Alaskans have other service quality issues as well. Some Alaskan consumers, for example, have complained to the State that the 800 telephone number provided for service or billing inquiries for one of the DBS service providers does not accept calls from Alaska.

Competition in video services markets served by Echostar and DIRECTV are already very concentrated, regardless of whether one views the relevant market as comprising DBS services or MVPD services more generally. Of course, transactions that reduce competition from two to one require the closest possible scrutiny. Competition authorities are also wary of mergers or acquisitions that reduce the key number of players in a market from three to two.[10] In this case then, where the transaction would substantially reduce competition in already highly concentrated markets, it is even more critical for the Commission to be convinced that the transaction will enhance competition before granting the application.

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9 *See* submissions of the State of Alaska in IB Docket No. 98-21.

10 For example, the Department of Justice brought suit to enjoin the merger of WorldCom and Sprint because, in part, of the view that there were telecommunication services markets in which competition would be reduced from three to two. *See United States v. WorldCom, Inc.*, Complaint, at ¶ 62 (D.D.C. June 26, 2000). In addition, the FTC brought suit to enjoin the merger of Heinz and Beech-Nut, two of the three dominant baby food companies in the U.S. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *F.T.C. v. H.J. Heinz Co.*, Civ. No. 1:00-CV-01688-JR, Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction, at 1 (D.D.C. July 14, 2000).

B. Broadband

In many portions of Alaska, DBS offers the promise of being the most efficient form of broadband access to the Internet. Commission reports show that broadband service in Alaska (particularly outside the Anchorage, Juneau, and Fairbanks areas) is scarce compared to the rest of the country.[11] The problems confronting telecommunications delivery in Alaska (such as few roads, very small and isolated communities, harsh weather and geography) raise serious concerns about whether broadband services by either DSL or cable modem will ever be available in most Alaskan communities.

This merger may reduce the number of broadband providers (particularly for next generation services) in many rural Alaskan (and probably other) communities from two-to-one, thus eliminating competition. Hughes appears to have committed to developing and launching SPACEWAY, a next generation satellite delivered broadband service, with North American service scheduled to begin in 2003, in the absence of the merger. App. at 14. In addition to continuing its interest in StarBand Communications, EchoStar hold interests in Wildblue Communications, Inc. and Celstat America, Inc., "both of which hope to offer a similar high-speed Internet service from Ka-band satellites in the future." *Id.* at 11. A combination would eliminate competition between the applicants.

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11 *See* Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, *High Speed Services for Internet Access: Subscribership as of December 31, 2000*, Tbl. 6 (Aug. 2001).

In an attempt to meet this concern, the applicants state that they have "already made significant broadband investments and plan[ ] future deployment of additional high-speed Internet access services," but due to economic and technological hurdles, "the parties expect that the proposed transaction will allow the two companies to develop a combined critical mass of broadband subscribers to spread the tremendous fixed costs, that as noted above, have deterred other satellite companies from proceeding with broadband satellite systems." *Id.* at 46-47. It appears clear, however, that prior to the merger, each of the applicants was indeed planning to offer next-generation broadband services despite expected competition from the other applicant. And, significantly, no specific evidence is presented in the application to justify the conclusion that each applicant had changed its mind.

The State believes that the Commission should carefully review the applicants' internal business documents to determine whether those documents are consistent with what the applicants apparently have done and or with what the application says. If the applicants were likely to compete against each other in current and next generation broadband services, then the application should not be granted without conditions designed to offset the diminution in competition in Alaska (and perhaps Hawaii as well). The State recommends that the Commission consider the following conditions to address this problem:

1. The post-merger firm must make current broadband service offerings available throughout all of Alaska within a specific, but reasonable, period of time (such as 6 months). If the post-merger firm can demonstrate that service to some areas is technically impossible (as opposed to not profitable),

it may apply to the Commission for partial relief from this condition. That application shall contain proof of the asserted technical impossibility. The FCC should place that application on public notice and invite comments prior to acting on it.

2. The post-merger firm must make next generation broadband service offerings available throughout all of Alaska at the same time such services are offered in CONUS. If the post-merger firm can demonstrate that service to some areas is technically impossible (as opposed to not profitable), it may apply to the Commission for partial relief from this condition. That application shall contain proof of the asserted technical impossibility. The FCC should place that application on public notice and invite comments prior to acting on it.

3. The post-merger firm must provide the same national pricing guarantees with respect to broadband services that are made with respect to video services. With respect to broadband, equipment and installation prices offered to consumers in Alaska (and perhaps Hawaii) must be equal to those offered to customers in CONUS, regardless of need for larger dishes or other additional or more expensive equipment or installation services.

III. ARE THE ASSERTED BENEFITS "ACHIEVABLE ONLY AS A RESULT OF THE MERGER" AND "SUFFICIENTLY LIKELY AND VERIFIABLE?

The Commission should also carefully consider whether the parties' claimed public interest benefits satisfy Commission precedent requiring that such benefits be merger-specific and verifiable.[12] The application claims several efficiencies from the merger that appear to require further verification and explanation as to why they cannot be achieved by some other alternative short of a merger.

12 *See* note 4, *supra*.

A. The Commission Must Determine Whether The Claimed Benefit Of Better Service For Rural America, Alaska, And Hawaii Is Verifiable.

The applicants state that Americans living in rural America, Alaska, and Hawaii will receive "more national programming networks and a better signal" as a result of the merger. App. at 33. Among other things, most DBS subscribers in Alaska purchase Echostar's service,[13] and receive their key programming from satellites located at 119 degrees W.L.[14] Yet, it appears that the merger might result in this key national programming being shifted eastward, from satellites positioned from 119 degrees W.L., to satellites positioned at 101 degree W.L. Joint Eng. Stmt., at 6 ("Under another possible scenario, most national programming could be placed on the 32 DBS frequencies at 101 [degrees] W.L. . . ."). It is the State's experience that this eastward shift in programming would greatly degrade service in some parts of Alaska and make service in other parts of Alaska impossible. From Alaska's perspective, the result would be a move backwards, not forwards. The Commission should thus carefully scrutinize this claimed benefit and require more specificity and proof to verify that the merger will in fact provide improved quality of service to Alaska (and Hawaii).

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13 Echostar offers a programming package to Alaskan subscribers (though it is not priced at a comparable level to CONUS services). DirecTV offers no programming package aimed at Alaska. It is our understanding that the service it offers in the Continental U.S. service can be received in some parts of the State.

14 *See* Joint. Eng. Stmt. at 4 (most of Echostar's national and approximately 10% of local broadcast programming is transmitted from satellites located at 119 degrees W.L.).

B. The Commission Must Carefully Inquire Whether the Proposed Nationwide Pricing Is Both Merger Specific and Sufficient.

The applicants state that rural Americans (not explicitly including residents of Alaska or Hawaii) would be assured of reasonable prices for DBS service because the merged company would offer DBS service nationwide at uniform prices. App. at 34. However, the parties also state that uniform pricing "is the most practicable and efficient method of DBS pricing."[15] *Id.* The merging parties, therefore, appear to agree that this alleged benefit is neither new nor merger-specific.

Moreover, the promise of uniform pricing may not, by itself, be sufficient to prevent geographic discrimination. Among other things, differences in service quality and ancillary customer services (handling of service complaints and billing issues) can result in the same prices being paid for inferior service, which is just as discriminatory as higher prices for the same quality of service.

C. The Commission Must Scrutinize Whether The Claimed Benefit Of "Local Into Local" Programming Is Merger-Specific.

The applicants claim that they can provide "local into local" programming into only about 35-40 local markets as independent competitors. App. at 28-29. By eliminating the need for each of them to duplicate the spectrum and transponder space allocated into the top 40 markets, they claim the merger will allow the post-merger firm to provide "local into local" programming into 100 local markets. *Id.*

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15 Indeed, the applicants admit that "satellites offer ubiquitous service at prices that are distance insensitive, in contrast to the distance-based prices that are characteristic of many terrestrial networks." App. at 44 & n.95.

The State recognizes the value of "local into local" programming. Residents of Alaska undoubtedly would find local programming of Anchorage television stations of far greater relevance than the programming of broadcast stations located many hundreds or even thousands of miles away.

It appears, however, that the benefit of increased "local into local" programming may be accomplished by means other than a merger. The application does not address this issue. There may well be alternative arrangements through which spectrum and associated spot-beam satellites used to provide "local-into-local" programming could be coordinated and shared to facilitate an increase in the number of areas which could receive "local into local" programming while maintaining competition (at least at the retail level). Given the anti-competitive issues raised the merger, the Commission must carefully inquire whether this asserted benefit can be achieved by arrangements short of an outright merger of Echostar and DIRECTV.

D. The Commission Must Scrutinize Whether The Claimed Benefit of Next Generation Broadband Internet Access Service Is Verifiable And Merger-Specific.

The applicants claim that the merger will enhance the ability of the post-merger firm to offer next generation broadband Internet access service nationwide via satellite. *Id.* at 43-49. However, the parties present no specific information to support the claimed enhanced ability, nor do they provide any information concerning what is likely to arise from it, particularly with respect to Alaska (and

Hawaii). Moreover, the applicants present information that appears to show that this claimed efficiency is ***not*** merger-specific.

As set forth above, Hughes's SPACEWAY service is scheduled to begin in 2003, in the absence of the merger (*id.* at 14), and EchoStar holds interests in two entities (Wildblue Communications, Inc. and Celstat America, Inc.) "which hope to offer a similar high-speed Internet service from Ka-band satellites in the future." App. at 11. The applicants' own actions appear to indicate that a merger is not necessary to provide these services.

Furthermore, even if, as the applicants now claim, it is not economically or technically feasible for each firm to develop a next generation satellite-delivered Internet access service on its own, the applicants do not address less anti-competitive alternatives to the merger. There may well be alternative arrangements into which the parties may enter that would achieve the same asserted benefit while permitting competition at least at the retail level. The Commission should carefully assess whether this claimed benefit is merger-specific or whether it could be achieved by means short of a merger.

IV. CONCLUSION

For the reasons stated above, this proposed transaction raises several important competition and public interest issues. The State therefore requests the Commission to scrutinize carefully the proposed transaction in accordance with Commission precedent and, if appropriate, to impose the conditions set forth above to assure that any reduction in competition in broadband services in Alaska is remedied effectively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of the State of Alaska in CS Docket No. 01-348 were served this 4th day of February 2002, by electronic mail to the following:

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